

No. 77-1550

Supreme Court, U. S.
FILED

JUN 15 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

RECREATIONAL PRODUCTS MARKETING, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1550

RECREATIONAL PRODUCTS MARKETING, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

The question presented in this federal excise tax case is whether petitioner was the "manufacturer" of certain gasoline tanks within the meaning of Section 4061(b) of the Internal Revenue Code of 1954 (26 U.S.C.), so as to make its sales of those tanks subject to excise tax.

The pertinent facts are as follows: Petitioner is a corporation wholly owned by James M. Yates, who created an original design for an auxiliary vehicular gasoline tank. In 1970, Yates applied for a patent covering the tanks and was issued a design patent on February 29, 1972. In 1970, petitioner entered into an agreement with Plastison, Inc., under which that company was to manufacture the tanks, using Yates' design, at a cost to petitioner of approximately \$7.50 per tank. The tanks

were to be produced by a process known as "blow-molding," using machines owned by Plastison. Production of the tanks by this process required the use of specialized molds¹ costing approximately \$10,000. As part of its agreement, petitioner reimbursed Plastison for the cost of those molds, and also paid for tooling charges, extrusion dies and various other items necessary for production of the tanks. Petitioner became the owner of the specialized equipment needed to produce its tanks (with the exception of the blow-molding machines which were used by Plastison to produce other products), and removed this equipment from Plastison's premises at the expiration of the agreement (Pet. 4; Pet. App. B, p. 6a; R. 65, 139).¹

Plastison did not make tanks using petitioner's design unless it had an order from petitioner or anticipated such an order. Every tank made by Plastison using petitioner's design and molds was delivered to petitioner (Pet. App. B, p. 6a; R. 139, 168). Plastison neither requested nor was given permission to produce the tanks for anyone other than petitioner (R. 154). By virtue of its patent, petitioner had control over the disposition of the tanks made by Plastison (Pet. App. B, p. 6a; R. 138-139, 153-154).

Plastison paid federal manufacturers excise taxes on its sales to petitioner based on a sales price of approximately \$7.50 per tank. On audit, the Commissioner of Internal Revenue determined that petitioner, rather than Plastison, was the manufacturer of the tanks for purposes of the manufacturers excise tax imposed by Section 4061(b). Accordingly, the Commissioner issued excise tax assessments against petitioner based on the retail sales

¹"R." refers to the record appendix filed in the court of appeals.

price (\$63.60) charged by petitioner to its customers.² The district court upheld the Commissioner's determination that petitioner was the manufacturer of the tanks. The court of appeals affirmed *per curiam* (Pet. App. A, p. 1a; Pet. App. B, pp. 2a-9a).

1. The court of appeals correctly held that petitioner was the manufacturer of the gasoline tanks in question for purposes of the excise tax imposed by Section 4061(b) on the sale of automobile accessories or parts by the manufacturer. Petitioner, of course, did not actually make the tanks. But it does not follow from this fact that petitioner was not the "manufacturer" of the tanks within the meaning of Section 4061(b). To the contrary, it has long been settled that the statutory manufacturer is the person who has the items made rather than the person who actually makes the items. See, e.g., *Carbon Steel Co. v. Lewellyn*, 251 U.S. 501; *Polaroid Corp. v. United States*, 235 F. 2d 276 (C.A. 1), certiorari denied, 352 U.S. 953; *Charles Peckat Mfg. Co. v. Jarecki*, 196 F. 2d 849 (C.A. 7), certiorari denied, 344 U.S. 875; *Warner-Patterson Co. v. United States*, 68 Ct. Cl. 237; see also Treasury Regulations 46, Section 316.4(b) (1940 ed.).³

The courts have considered the fabricator's lack of a proprietary interest in the completed product as a critical factor indicating that the person who contracted for the

²The district court concluded that the proper sales price of the tanks for purposes of computing the tax imposed by Section 4061(b) was \$54.50, rather than \$63.60 (Pet. App. B, pp. 7a-8a). The government did not challenge that determination in the court of appeals, appeals.

³Treasury Regulations on Manufacturers and Retailers Excise Tax (1954 Code), Section 48.0-2(a), promulgated by T.D. 7536, 1978-18 Int. Rev. Bull. 15, which petitioner cites (Pet. 7), is not to the contrary. As subparagraph 4(ii) makes clear (Pet. App. E, pp. 22a-23a), a person who does not actually manufacture the item will nevertheless be regarded as the manufacturer under certain circumstances.

product to be fabricated, rather than the fabricator, is the statutory manufacturer. This lack of a proprietary interest arises where, as here, one company manufactures a patented item for another company which either holds the patent or is an exclusive licensee of the patent holder. Thus, if, as in this case, the person making the item for the patent holder has no right to sell or otherwise dispose of the completed item, except as directed by the patent holder, the courts have consistently held that the "first sale"⁴ of the item by the manufacturer occurs not on the delivery of the item to the patent holder, but rather when the patent holder sells the item to its customers. *Charles Peckat Mfg. Co. v. United States, supra*; *Polaroid Corp. v. United States, supra*; *Warner-Patterson Co. v. United States, supra*. Indeed, petitioner itself recognizes (Pet. 5-6, 10) that the decisions in *Charles Peckat Mfg. Co.* and *Polaroid Corp.* squarely support the decision below.

2. Contrary to petitioner's contention (Pet. 5), *Air Lift Co. v. United States*, 418 F. 2d 558 (C.A. 6), affirming 286 F. Supp. 249 (W.D. Mich.), is distinguishable. In *Air Lift*, the taxpayer, which held the patent on the use of certain inflatable rubber cylinders as suspension devices in automobiles, contracted with another company for the fabrication of those cylinders. Unlike this case, *Peckat* and *Polaroid*, the fabricator in *Air Lift* was free to sell the rubber cylinders (which had numerous uses other than as suspension devices) to purchasers other than the taxpayer, subject only to the limitation that it not advertise their use

⁴As this Court explained in *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 574, the excise tax is not "laid on all sales, but only on first or initial sales- those by the manufacturer." Contrary to petitioner's assertion (Pet. 6), the identity of the manufacturer was not an issue in *Indian Motorcycle Co.* and it consequently has no bearing on the resolution of this case.

as spring suspension devices. On the basis of this fact, the court concluded that the fabricator did have a proprietary interest in the completed product so as to make its transfer of the cylinders to the taxpayer the taxable first sale.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.,
Solicitor General.

JUNE 1978.